

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARY, UPMC	Cases:	06-CA-102465
PRESBYTERIAN SHADYSIDE, SINGLE		06-CA-102494
EMPLOYER, d/b/a UPMC		06-CA-102516
PRESBYTERIAN HOSPITAL AND d/b/a		06-CA-102518
UPMC SHADYSIDE HOSPITAL		06-CA-102525
		06-CA-102534
		06-CA-102540
		06-CA-102542
		06-CA-102544
and		06-CA-102555
		06-CA-102559
		06-CA-102566
		06-CA-104090
SEIU HEALTHCARE PENNSYLVANIA,		06-CA-104104
CTW, CLC		06-CA-106636
		06-CA-107127
		06-CA-107431
		06-CA-107532
		06-CA-107896
		06-CA-108547
		06-CA-111578
		06-CA-115826

**UPMC’S BRIEF IN SUPPORT OF EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE MARK CARISSIMI’S  
DECISION AND REQUEST FOR ORAL ARGUMENT**

This case arises out of a corporate campaign by SEIU Healthcare Pennsylvania targeting UPMC, a holding company, and various of its subsidiaries. The charges in the instant matter arise out of SEIU’s organizing efforts at one such subsidiary, UPMC Presbyterian Shadyside (“Presbyterian Shadyside”). There has been no petition filed. The hearing on this matter was held before the ALJ beginning on February 12, 2014 and spanned several weeks. The ALJ bifurcated the matter, proceeding with a hearing on the unfair labor practice allegations in the Complaint and deferring the hearing on the single employer allegations to a later date. Tr. 2783:4-2787:15. During the hearing, Presbyterian Shadyside presented its defenses to the

unfair labor practice allegations in the Complaint. Before and during the hearing, the ALJ ruled on several subpoena disputes between the parties. The ALJ issued his Decision on November 14, 2014.

UPMC now excepts to the ALJ's decision as well as to his findings, rulings, and conclusions on matters presented prior to, during and after the hearing to the extent those findings, rulings, and conclusions are applicable to UPMC. UPMC further excepts to the ALJ's ruling that UPMC produce information in response to improper and overly burdensome subpoenas and his refusal to grant UPMC's motion to dismiss the untimely amendment adding it as a party-Respondent.

**I. The ALJ Erroneously Failed to Grant UPMC's Motion to Dismiss (Exception 1)**

As set forth in more detail in its Motion to Dismiss Amendments and Memorandum in Support, UPMC was erroneously added as party-Respondent in this matter, and the ALJ erred in refusing to grant UPMC's Motion to Dismiss at the close of the hearing. Tr. 3133:11-19.

In April 2013, the Union filed unfair labor practice charges asserting, in addition to its merit allegations, that Presbyterian Shadyside and UPMC were a single employer under the Act. UPMC is a legal holding company that includes independent entities (both for profit and not for profit) with twenty hospitals other than Presbyterian Shadyside. After months of investigation and taking evidence, Region 6 found that UPMC was not a necessary party and that the Union's single employer allegations had no relevance to this proceeding. Accordingly, in September 2013, the Region determined that there was no basis to proceed against UPMC. The Union filed amended charges (per the Region's instruction) that were identical to the original charges, except UPMC was dropped as a charged party. The proceedings against UPMC ended.

Then, on January 10, 2014, mere weeks before the rescheduled hearing was set to begin on February 3, 2014, the Region issued an Amended Consolidated Complaint with the only substantive change of adding UPMC as a party-Respondent and asserting the Union's single employer theory. There were no allegations, however, that Presbyterian Shadyside, a substantially capitalized entity, was incapable of remedying any of the alleged unfair labor practices; nor were there any allegations that the two entities have engaged in any schemes or artifices to thwart the enforcement of the Act. The Region's only explanation for the amendment that they were told by "Washington" to do it.

Since the amendments are untimely, violate the due process rights of both UPMC and Presbyterian Shadyside, and do not advance the purposes of the Act, UPMC's Motion to Dismiss Amendments should have been granted, and the ALJ's finding to the contrary is error and must be reversed. Tr. 3133:11-19.

In September 2013, UPMC was relieved of any involvement in this matter, as indicated by the Region. Then, without any newly discovered evidence, the Board later decided that it wanted to again add UPMC as a party-Respondent. In so doing, the Region sought to amend charges filed more than six months prior. Any notion that the amended charges against UPMC served on January 10, 2014 could "relate back" to the original timely charges is unsustainable. The Region's decision in September 2013 to dismiss UPMC from all charges marked a clear demarcation in these proceedings — from that point on, the Region was only pursuing charges against Presbyterian Shadyside. UPMC did not remain involved in any capacity. As of September 2013, the charges and allegations against UPMC ceased to exist. The Board's reasoning in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *overruled on other grounds by LAM District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991), is directly on point. There, the

Board found that a reinstated charge was outside the Section 10(b) limitations period, reasoning as follows:

We hold today that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) . . . .

Further, we find this standard must apply regardless of whether the charge was withdrawn *or* dismissed. We see no substantive distinction between a withdrawn and a dismissed charge. In either event, the charge has been disposed of and, in effect, ceases to exist. *Moreover, it seems to us that the dismissal of a charge by a government official well versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than is the case when it is merely withdrawn.*

*Ducane*, 273 NLRB at 1390 (internal citations omitted) (emphasis added). Notwithstanding the Board's well-established precedent, this is exactly what the ALJ permitted in the instant case by failing to grant the Motion to Dismiss.

In addition to the untimeliness of the amendment, the addition of UPMC in the Amended Consolidated Complaint denied UPMC its due process rights as guaranteed by the United States Constitution. "The test of due process in this setting is a determination of fair notice . . . [where] the crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence. . . . The test of due process in these circumstances remains one of fairness under the circumstances of each case. . . ." *NLRB v. Quality C.A.T.V, Inc.*, 824 F.2d 542, 546 (7th Cir. 1987) (internal citations omitted). *See also Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1967) ("Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement.").

The denial of due process is also epitomized by the Region's decision during its investigative phase to remove the holding company UPMC as a respondent only to reverse that decision *after* concluding its investigation and *after* issuing the Consolidated Complaint, and *after* the hearing date was set. During the course of its investigation, Region Six concluded that the holding company UPMC should not be subject to a complaint because the Union's single employer allegations lacked any relevance to the ULPs alleged in this proceeding. Thus, the Region found *during the course of its investigation* that UPMC is not a proper respondent herein.

Whatever the reason or motivation behind naming UPMC as a party-Respondent in the Amended Consolidated Complaint, it is obvious that this maneuver does not further the purposes of the Act. Other than naming UPMC as a party-Respondent and adding the corresponding single employer allegation, the remainder of the Amended Consolidated Complaint was identical to the Consolidated Complaint, where UPMC did not appear in any fashion. Presbyterian Shadyside is fully capable of effectuating all of the ALJ's proposed remedies, without UPMC's assistance. Also, notably, there were no theories advanced or evidence adduced at the hearing to suggest that UPMC engaged in any unfair labor practices or was otherwise involved in the matters set forth in the Complaint. For these reasons, the ALJ erred in denying UPMC's Motion to Dismiss. Tr. 3133:11-19. This ruling must be reversed by the Board.

## **II. The ALJ Improperly Ordered UPMC Produce Documents in Response to Improper and Overly Burdensome Subpoenas (Exceptions 2 and 3)**

Ostensibly in furtherance of the uninvestigated single employer claims,<sup>1</sup> the General Counsel and the Charging Party served massive subpoena requests on Presbyterian Shadyside

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<sup>1</sup> As set forth above, the Region never investigated the claim of single employer status as the issue is irrelevant to the merits of the alleged unfair labor practice allegations. Among other matters, it is clearly abusive to utilize a trial subpoena to conduct a fishing expedition into a theory that should have been investigated beforehand. It is axiomatic that if, as appears to be the

and on UPMC. The subpoenaed materials would require hundreds of hours to locate, review, and compile, and compliance would be extraordinarily costly. Indeed, the cost of compliance would far exceed any conceivable monetary liability in the instant matter. *See* UPMC's Petition to Revoke Subpoena No. B-720563; UPMC's Petition to Revoke Subpoena No. B-720504.

The ALJ improperly denied the Petitions to Revoke these subpoenas.<sup>2</sup> In support of its position that the ALJ erroneously denied UPMC's Petitions to Revoke, UPMC adopts the argument set forth in more detail in Presbyterian Shadyside's Exceptions and Brief in Support. The ALJ erred in ordering UPMC to respond to overly broad and unduly burdensome subpoenas which were issued for an improper purpose and seek irrelevant documents. The ALJ committed clear error by failing to grant the Petitions to Revoke in contravention of the Federal Rules and governing Board precedent. Tr. 2784:5-2785:10. *CNN America, Inc.*, 352 NLRB 448 (2008); Fed. R. Civ. P. 45(d)(3)(A)(iv); and Fed. R. Civ. P. 26(b)(2)(C)(iii). His rulings must be reversed.

### **III. To the Extent Applicable to UPMC, the ALJ's Conclusions of Law, Order, and Proposed Remedies are Erroneous and Without Merit (Exception 5)**

As set forth in more detail in Presbyterian Shadyside's Exceptions and Brief in Support, the ALJ's conclusions of law, order, and proposed remedies are wholly without support in the law and on the record. The ALJ's Decision in this case was expressly limited to Presbyterian Shadyside and expressly excluded any finding, conclusion, or order against or regarding UPMC.

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case, the General Counsel needed the information in the trial subpoena to make a probable cause determination on the single employer issue, that the amendment seeking to add UPMC could not have been made in good faith.

<sup>2</sup> Although the matter of subpoena enforcement is currently pending before the Third Circuit, the ALJ's improper denial of UPMC's Petitions to Revoke is still material with respect to these Exceptions since the scope of review in the Third Circuit may be more limited than the breadth of the ALJ's error in failing to grant the Petitions to Revoke.

D. 112:35-120:3. To the extent the ALJ made any ruling, finding, or conclusion requiring UPMC to file an exception to preserve its rights, UPMC adopts and incorporates by reference herein all exceptions and supporting record, legal authorities, and arguments asserted in the exceptions and supporting brief filed on this date by Presbyterian Shadyside.<sup>3</sup> Moreover, inasmuch as UPMC is not a party to this proceeding based on the ALJ's bifurcation order, UPMC further reserves its right to fully defend any and all allegations made against it, to amend these exceptions, or to present evidence that may be relevant to UPMC's defenses.

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<sup>3</sup> By adopting Presbyterian Shadyside's Exceptions and Brief in Support, UPMC does not waive any of rights afforded to respondents under the Act, including the right to a hearing, to present evidence, and to adequately defend itself against all of the allegations in this matter. Moreover, UPMC does not waive its right to amend or supplement these exceptions at the close of the bifurcated hearing.

Respectfully submitted this 9th day of January, 2015.

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## **CERTIFICATE OF SERVICE**

It is certified that a copy of UPMC's Brief in Support of Exceptions to Administrative Law Judge Mark Carissimi's Decision and Request for Oral Argument in the above-captioned case has been served by email on the following persons on this 9th day of January, 2015:

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